No. 04-1414

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, *Petitioner*,

v.

JEFFREY GRUBBS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a facially invalid anticipatory search warrant may be rendered valid by information contained in an affidavit that is not presented to the persons whose property is to be searched?

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Respondent, Jeffrey Grubbs, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the lower court's opinion in this case.[1]

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Respondent has no objection to the background facts in the petition, with the following supplement:

The district court found that thirty minutes transpired after Mr. Grubbs was detained by the officers and after his premises were searched, before the defective search warrant was placed on the table where Grubbs was detained by the officers. App. 31a-32a; 41a. The district court found that this was a violation of Fed.R. Crim. P. 41(d). App. 42a. However, the district court found that Mr. Grubbs had never specifically asked to see the warrant, and therefore the Rule

[1] Respondent has no objection to Petitioner's jurisdictional statement.

41(d) violation was a "technical" one not requiring suppression because the officers did not "deliberately disregard" Rule 41(d). App. 42a-44a. The Ninth Circuit did not reach this issue because of its resolution of the principal question in the case. App. 4a.

REASONS FOR DENYING THE PETITION

The cases cited by petitioner as in conflict with the decision herein predate this Court's opinion in Groh v. Ramirez, 540 U.S. 551 (2004). Insufficient time has passed since Groh for any real conflict among the circuits to develop, making this Court's intervention unnecessary at this time. Moreover, the Grubbs opinion does not create any significant problems in the administration of the criminal justice system. Finally, the opinion correctly reflects the governing jurisprudence.

I. The Asserted Inter-Circuit Conflict Will Likely Resolve Itself As Courts Reconsider Their Precedents in Light of *Groh v. Ramirez*.

Petitioner's claim of inter-circuit conflict ignores the fact that the cases cited as being in conflict with the Ninth Circuit's opinion in this case predate this Court's decision in Groh v. Ramirez, 540 U.S. 551 (2004), upon which the Ninth Circuit relied. Circuit uniformity will likely be reached as these decisions are reconsidered by the issuing courts in light of Groh.

In Groh, this Court held that a warrant defective on its face cannot be cured by an affidavit that neither was incorporated into the warrant nor accompanied it. The Court recognized that one purpose of the particularity requirement is that "[a] particular warrant also 'assures the individual whose property is searched of the lawful authority of the executing officer, his need to search, and the limits of his power to search.'" Groh, 540 U.S. at 561 (quoting United States v. Chadwick, 433 U.S. 1, 9 (1977)). The Court acknowledged that "most Courts of Appeal have held that a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the

supporting document accompanies the warrant." 540 U.S. at 557-58 (citing, *inter alia*, the Ninth Circuit's decision in United States v. McGrew, 122 F.3d 847, 849-50 (1997), the forerunner of the decision in the present case). The Groh court concluded that the incorporation doctrine was irrelevant because "in this case the warrant did not incorporate other documents by reference, nor did either the affidavit or the application (which had been placed under seal) accompany the warrant." Id., at 558.

All the cases cited by petitioner to frame an inter-circuit conflict pre-date the Groh decision. They appear to have limited validity because of their inconsistency with Groh's treatment of curing a warrant defect by specific incorporation of an accompanying affidavit. First, in four of the cases cited by petitioner, the affidavit was not incorporated into the warrant. United States v. Rey, 923 F.2d 1217 (6th Cir. 1991); United States v. Tagbering, 985 F.2d 946 (8th Cir. 1993); United States v. Moetamedi, 46 F.3d 225 (2d Cir. 1995); United States v. Hugoboom, 112 F.3d 1081 (10th Cir. 1997).[2] Second, in four of the cited cases, the affidavit was not attached to and did not accompany the warrant. United States v. Rey, supra; United States v. Moetamedi, supra; United States v. Hugoboom, supra; United States v. Dennis, supra.[3] Thus, all of these decisions must be reconsidered by the issuing courts in light of this Court's subsequent decision in Groh. Upon reconsideration, it is likely that any perceived inter-circuit conflict will resolve itself.

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[2]In the fifth case, United States v. Dennis, 115 F.3d 524 (7th Cir. 1997), "[t]he face of the warrant stated the execution of the warrant was subject to the conditions stated in the affidavit." Id., at 529.

[3]In the fifth case, United States v. Tagbering, supra, "the affidavit . . . was attached to the copies of the warrant the officers brought with them when they conducted the search." 985 F.2d at 950.

For example, in Baranski v. Fifteen Unknown Agents of the Bureau of Alcohol, Tobacco & Firearms, 401 F.3d 419 (6th Cir. 2005), the Sixth Circuit relied upon Groh to hold that a warrant lacking in particularity could not be cured by the supporting affidavit when the affidavit did not accompany the warrant:

> The particulars had to be communicated to the manager of Pars [the business to be searched] through the warrant or an attachment to the warrant. It is undisputed that they were not because as in Groh, the affidavit that contained the particulars did not accompany the warrant at the time of the search and seizure.

401 F.3d at 429. It is likely that other circuits, including those cited by petitioner, will join the Sixth and the Ninth in this interpretation of Groh.

Thus, the issue presented by petitioner is not ripe, and intervention by this Court would be premature.

II. THE CLAIMED RECURRING IMPORTANCE OF THE ISSUE PRESENTED IS EXAGGERATED

Petitioner overstates the recurring importance of the issue presented to the administration of the criminal justice system. First, the Ninth Circuit's decision enunciates a bright-line rule that law enforcement agencies and judicial officers can easily follow: in the case of an anticipatory search warrant, the triggering event must be set forth in the warrant itself, or in an affidavit that is incorporated by reference into the warrant and that will be attached and accompany the officers when the warrant is executed.[4]

Second, making law enforcement agencies aware of the rule, Pet. 21-22, is no more

---

[4]Petitioner's claimed concern about this rule on the basis that "search warrants must often be prepared in haste," Pet. 22, is misplaced in the case of anticipatory search warrants which, by their nature, generally allow ample time for preparation.

difficult than with any other rule of law. Indeed, it is actually less difficult because of the bright-line nature of the rule and the ease of compliance with it.

Finally, the very simplicity of the rule and the ease of compliance ensures that it will not "create an incentive to avoid use of anticipatory warrants." Pet. 21. Thus, there is no reason to believe that, in response to the rule, law enforcement officers will "'simply conduct the search (justified by "exigent circumstances") without any warrant at all.'" Id.

III. THE LOWER COURT CORRECTLY CONCLUDED THAT WHEN, AS HERE, THE WARRANT IS FACIALLY INVALID AND THE CURATIVE AFFIDAVIT IS NOT PRESENTED TO THE RESIDENTS, THE EVIDENCE MUST BE SUPPRESSED.

The Ninth Circuit correctly held that an invalid warrant cannot be cured by an affidavit that does not accompany the warrant. A search warrant "serves a high function." McDonald v. United States, 355 U.S. 451, 455 (1948). It interposes between the police and the public a neutral magistrate, who weighs the needs of law enforcement against a citizen's right of privacy. Id. By requiring issuance of a warrant only on a proper showing of probable cause, the Fourth Amendment guards not only against general searches, it also "assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and *the limits of his power to search*." United States v. Chadwick, 433 U.S. 1, 9 (1977) (emphasis added). In this case, Inspector Welsh drafted a warrant that was plainly invalid on its face. It stated that the affidavit established probable cause that the videotape "is now concealed" at Mr. Grubbs' house, App. 47a, when in fact, the affidavit stated that inspectors would attempt to deliver the videotape the next day, App.71a, and assured that the warrant would not be executed until the videotape "has been received by a person(s)" at the house "and has been physically taken into the residence." App. 57a, 72a. While the word "ANTICIPATORY" was hand-written at the top of the warrant above the words "SEARCH WARRANT," the warrant did not specify the acceptance of the videotape as the event authorizing execution; it therefore could not "assure[]" Mr. Grubbs "of "the limits of [Welch's] power to search." And because the affidavit was not presented to Mr. Grubbs, it could not cure that defect in the warrant.

Petitioner does not dispute that the warrant itself failed to set forth the triggering event.

See Pet. 11. Instead, it argues that the particularity requirement of the Fourth Amendment requires that only the place to be searched and the persons or things to be seized need be described in the warrant, not the conditions precedent to an anticipatory search warrant. Pet. 10.[5] But factors other than those specifically listed in the Fourth Amendment's text must appear on the face of the warrant for it to be constitutionally valid.

For example, a warrant is constitutionally invalid if it is not signed by a "neutral and detached" magistrate. Coolidge v. New Hampshire, 403 U.S. 443 (1971). In Coolidge, the state attorney general, who was authorized by state law to issue search warrants in his capacity as a justice of the peace, issued a search warrant for the defendant's car in the course of a murder investigation of which he had taken personal charge and for which he later served as chief prosecutor at trial. While nothing in the text of the Fourth Amendment requires that a search warrant be signed by a magistrate, much less a "neutral and detached" magistrate, the Court nonetheless relied on the "the policy underlying the warrant requirement of the Fourth Amendment" to hold that the search warrant was constitutionally invalid. 403 U.S. at 449. It explained:

> We find no escape from the conclusion that the seizure and search of the Pontiac automobile cannot *constitutionally* rest upon the warrant issued by the state official who was the chief investigator and prosecutor in this case. Since he was not the neutral and detached magistrate *required by the Constitution*, the search

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[5] Petitioner contends that the fact that the Fourth Amendment does not require warrants to describe with particularity "when the search may first take place" is "telling evidence that those who framed and ratified the Bill of Rights did not believe that advising a person of that fact" was as important as advising him of what property may be searched and what things may be seized. Pet. 12. But anticipatory search warrants are of relatively recent vintage and were unknown to those who framed and ratified the Bill of Rights, see United States v. Bingham, 270 F. Supp. 2d 665, 668 (W.D. Penn. 2003) (citing Fed. R. Crim. P. Rule 41, Advisory Comm. Notes 1990 Amendments), so it is unsurprising that the Fourth Amendment text does not address the issue.

stands on no firmer ground than if there had been no warrant at all.

403 U.S. at 453 (emphasis added).

Similarly, a search warrant is constitutionally invalid if it does not contain a termination date. United States v. Bailey, 628 F.2d 938 (6th Cir. 1980). In Bailey, the government obtained a search warrant to install a "beeper" in a drum of chemicals that could be used to manufacture PCP, but the warrant contained no time limitations.[6] Relying on Berger v. New York, 388 U.S. 41 (1967), which invalidated a statute that permitted an initial two-month surveillance period based on a single showing of probable cause and further extensions beyond the two months without a new showing, and United States v. Lamonge, 458 F.2d 197 (6th Cir. 1972), which held invalid an undated order purporting to authorize wiretapping for a period of eight days "from the date of this order," the court in Bailey held that a warrant that places no time limit on the search or seizure it purports to authorize is invalid. The court explained, "In our view, the issuance of a search warrant without a termination date seriously undermines the very fourth amendment interests the search warrant requirement is designed to protect." 628 F.2d at 946.

Thus, petitioner's argument that the Ninth Circuit is "add[ing] a fifth requirement" to the Warrant Clause is off target. Pet. 10. Just as the courts did in Coolidge and Bailey, the Ninth Circuit is simply enforcing the fourth amendment interests the warrant requirement is designed to protect in the modern context of anticipatory warrants.

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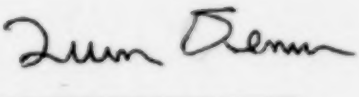
[6] A "beeper" is a small radio transmitter that broadcasts a signal. 628 F.2d at 938 n.1.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Dated: June 20, 2005

Respectfully submitted,



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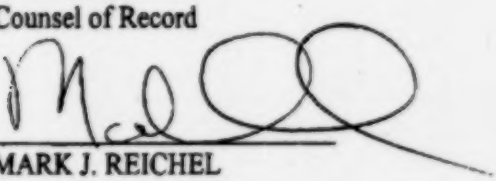

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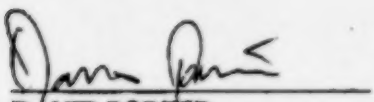

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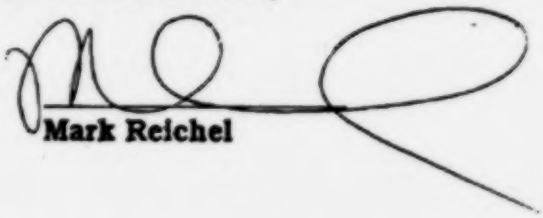
CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the Respondent's Brief in Opposition via e-mail and Federal Express, this 20th day of June, 2005.

[See Attached Service List]



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